IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO.657 OF 1994

Assistant Collector of Customs .. Appellant
(Orig.Complainant)

V/s.

1. Moh.Azan Khan @ Mali Mohd. Khan @Hamid Khan S/o Gul Azam Khan, A-8 Joti Building 3rd floor, Room No.215, Old D.N. Nagar, Andheri (W), Bombay -58. ..Respondents 1 to 5 (orig. Accused No. 1 to 5)

2. Mohd. Yakub Shaikh
R/at Zopadpatti Behind Mahim
Bus Dept., Mori Road, Mahim
Country Liquor bar galli
Bombay-16.

3. Aslam Mohammed Nazir
Makaba Building, Room No.14,
1st Floor, 3rd Sahagli Street,
Byculla, Bombay 400008.

4. Ashak Hussain Allah Detha @
Siddique Hussain M. Khan,
P.M. 61/2 Mitha Nagar,
Opp. Municipal Officer, M.G.
Road, Goregaon (W), Bombay -90,
(Pakistani National)

5. Riyaz Ahmed Afzal, R/at 210
R.K. Hotel, Lamington Road,
Bombay-8 (Pakistani National)

6. State of Maharashtra. ..Respondents.

Shri R.F. Lambay, Standing Counsel for the appellant.

Shri A.M. Singarpure, A.P.P. for respondent No.6.

Appeal against Accused Nos.1,2,4 and 5 dismissed for non-prosecution by order dated 21/9/1998.

None for the respondent No.3,though served.

CORAM : S.S. PARKAR, &
ANOOP V.MOHTA, JJ.
DATE : 10TH MARCH, 2005.

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.)

. This is an appeal filed by the Assistant Collector of Customs-original complainant, on behalf of the Collectorate Customs of Bombay, against an order of acquittal dated 9/11/1992, passed by the Special and Additional Sessions Judge, Greater Bombay, whereby, respondents-original accused Nos. 1 to 5 have been acquitted of criminal charges under section 21,29 r/w section 8(c) of the Narcotic Drugs and Psychotropic Substances Act (for short NDPS Act) and also under Section 135(1)(a), (b)(ii) of the Customs Act (For Short Customs Act).

2. By an order dated 21/9/1998 the appeal was dismissed for non prosecution against respondents 1,2,4 and 5. Therefore, the present appeal only against respondent No.3. Respondent No.6 is State of Maharashtra. Heard the Learned Counsel Mr. R.F. Lambay for the appellant, the learned A.P.P. Mr. A.M. Shringarpure, for the respondent No.6. None appeared

for respondent No.3, though, duly served.

3. On the basis of specific information, which was not reduced into writing, the officers of the appellant-Collectorate Customs of Bombay, went to Tejpal Lane, Gowalia Tank on 19/7/1989. They were keeping surveillance for a consignment of the Heroin (brown sugar), which was transported into city, from Pakistan, kept in two Fiat Cars bearing NO. MHY 2625 and GJV 5440. Those cars were parked in Tejpal Lone, Gowalia Tank. During the surveillance they noticed that accused No.2 (respondent NO.2) and accused No.3 (respondent No.3 were approaching towards the two cars. Accused No.2, towards Car No. MHY 2625 and accused No.3 towards Car No. GJV 5440. The officers, immediately rushed towards them and apprehended accused No.2 on the spot, who was entering into the car. Accused No.3 on seeing this, ran away. However, he was chased by the officers and brought back to the spot. In presence of two panchas, after personal search of accused No.3, six keys of the car GJV 5440 were recovered. Accused No.3 opened the dicky of the said car and one gunny bag a cloth packets were found in the dicky. Accused No. 2 opened the dicky of the card MHY 2625 and found one reddish brown

zipper suit case and a blue zipper hand bag, with similar packets. The Officers took accused Nos. 2 and 3 and two cars with the contents to their office at New Custom House, Ballard Estate. The panchas were accompanied with them. No seizure panchanama was drawn on the spot. After reaching to the office, those gunny bags were removed from the dicky and taken to the 11th floor of the building of the New Customs House. Those bags were opened in the presence of panchas. The packets 46 in number, bearing foreign markings were recovered from the Car No. GJV 5440. From the car No.MHY 2625, similar 54 packets were recovered. Therefore, in all they recovered 100 Kgs. brown coloured powder, from 100 packets. Those powder found to be heroin after test. The representative samples were drawn and seized under the seizure panchanama.

4. Thereafter. the batch of officers also went to the R.K. Hotel, Lamington Road, Bombay and brought accused No.1 and absconding accused Nos. 4 and 5 from room No.301. They also brought one Maruti Van bearing No.BLB 7445 belongs to accused No.1 and used by accused No.1 for dropping accused Nos. 2 and 3 at Gowalia Tank.

5. The statements of all these accused Nos. 1,2 and 3 were separately recorded. Accused no.1 was concerned with the import of the drug. The services of accused No.2 and 3 procured for driving the two cars which were made available to him by one Farooq of Bombay Central. On 19/7/1989 accused No.2 and 3 had accordingly, taken the two cars, at the instance of accused No.1. The consignment in question were loaded in the dickies of the two cars from the truck which was brought to Bombay by one Saidulla and others. Those cars were driven to a lane near Jaslok Hospital and parked there in the evening. Accused Nos.2 and 3 were relieved thereafter. They were asked to contact accused No.1 at R.K. Hotel at night. The keys of those two cars were handed over to accused No.5 Those keys were further handed over to accused No.1 by accused No.5 and informed to pick up the two cars, which were parked at Nana Chowk, near Bus Terminus. Accused No.1 was escorting in his Maruti Van BLB 7445, the two cars driven by accused Nos. 2 and 3 in all places.

6. Accused Nos. 2 and 3 contacted accused No.1 in the same night. Accused No.1 took accused Nos. 2 and 3 to Gowalia Tank in the same Maruti Van and directed them

to follow his Maruti Van by driving the two cars in question. The keys of those two cars were therefore, handed over to accused Nos. 2 and 3 respectively. The customs Officers, as referred above, however, apprehended the cars and accused No.2 and 3.

7. On 21/7/1989, accused Nos. 1,2 and 3 were arrested. The statements of accused Nos. 4 and 5 were also recorded, wherein they admitted that they were working for Saidulla for bringing narcotic drug from Pakistan to India through Punjab border and had come to Bombay in that connection. They also stated in detail about the arrival of the truck, their contact with accused No.1 and events upto the parking of the cars in the lane by the side of J.J. Hospital.

8. The samples of brown sugar were sent to Dy. Chief Chemist for chemical examination. The report of the same confirmed that the samples were heroin. After completion of the investigation, a sanction was obtained for prosecution under the provisions of Customs Act from the Collector of Customs against accused Nos. 1 to 5 and based upon that the complaint was filed against all the 5 accused in Sessions Court, Greater Bombay, on

18/10/1989. Accused Nos. 4 and 5 were released on bail and since then they are absconding. Therefore, the case against accused No.4 and 5 was separated. Accused Nos. 1 to 3 pleaded not guilty to the charges levelled against them. Their defence was of total denial. Accused No.1 had specifically stated that he had no concerned with contraband goods and he was falsely implicated in this case. He was coerced and forced to sign the documents on 21/7/1989. Accused No.2 contended that he was forcefully booked by the custom officers and forced to give statements which he had resisted. In the morning of 21st July, 1989. He was again assaulted, compelled and lastly obtained the signature on the documents. Accused No.3 stated that 8-9 Customs Officers compelled him to give his name and address and assaulted him continuously. On 21st July, 1989 they managed to get signatures on the documents by force. The prosecution examined 21 witnesses. There was no defence witness.

9. The purpose and reason for examination of these 21 witnesses, as stated by the trial Court is as under.

"An Intelligence Officer Sharma, P.W. 1, who made the

seizure; Intelligence Officer Pandey P.W. 2, who was the member of the raiding party, who made the seizure and who later on apprehended the accused No.1 absconding accused Nos. 4 and 5 and their two companions, who were subsequently released from Room No. 301 of R.K. Hotel and who also seized the Maruti Car bearing No. BLB 7445 allegedly belonging to accused No.1, Mr. Shankar, P.W.3, the Superintendent of Customs, who supervised the seizure and recorded the statement of accused; Intelligence Officer Gavankar, PW 5 who besides being the member of the raiding party had confronted the accused Nos. 2 and 3 with the accused No.1 in which they identified each other and who drew the confrontation panchanama, Intelligence Officer Gulzar Singh, PW6, who interpreted the statement to accused No. 3 and who drew the arrest Memos in respect of accused Nos. 3,4 and 5, Intelligence Officer Joginder Singh , P.W. 7, who interpreted the statement to absconding accused Nos. 4 and 5, Intelligence Officer Sukhvinder Singh Gill, P.W. 8, and panch witness Manu Karia, P.W. 10 who were concerned in the panchanama (Exh.64) regarding refusal of accused No.1 to make statement on 13/9/1989; Ajay Mehta, P.W.9 and Ramesh Naik, P.W. 12, the two panchas to the seizure made by the Officers on

the night of the incident; Sureshkumar, P.W. 11, the owner of the pan shop situate near the R.K. Hotel at Lamington Road, who identifies accused No.1 being the same person, who was using the Maruti Car No.BLB 7445; Mr. Khandekar, P.W. 13, Mr. Ramaswami, P.W. 14 Vasant Kanchaggar, P. W. 15 and Mr. Desai, P.W. 16, the Asstt. Chemical Analysers working at CRCL and in the officer of the Dy. C.C. Bombay, who analysed the various samples drawn in this case and gave test report; Kishor Rajput, P.W. 17, a Car broker under whose brokership Maruti Car No.BLB 7445 was sold to accused No.1 on 20/6/1989 and who made the delivery of the car to accused No.1 under delivery (Exh.38), Sayyed Allarakha, P;W.19, the Manager of the R.K. Hotel who identifies accused No.1 being staying in R.K.Hotel at relevant time and who allegedly accompanied accused No.1 for purchasing the Maruti Car, Reddy, P.W.18, who owned the Fiat Car No.MHY 2625 which he had given to one Pujari on hire under an agreement (Exh.85) who allegedly in turn gave the car to accused No.2, Intelligence Officer Shashidharan, P.W.20 who had recorded the statement of sayyed Allarakha (Exh.19), Superintendent of Customs Mr. Soman, P.W. 4, who did part of the investigation under which he recorded the statement of

witnesses Sayyed Farooq, Sureshkumar (P.W.11) Reddy (P.W. 18) and Pujari, and Intelligence Officer Bisoji P.W. 21, who speaks about attempting to serve the summons on Ravindra Pujari and reports non availability of that witness."

10 . The learned Judge acquitted accused-respondents Nos. 1 to 3 from all charges. The common charges were levelled against original accused Nos. 1 to 5, basically of conspiracy and, illegal possession and transportation of 100 Kgs. of heroin in India, as referred above. The present appeal survives only against respondent No.3. Accused Nos. 4 and 5 are absconding. Appeal against original accused Nos. 1,2,4 and 5 was dismissed for non prosecution by the order dated 21/9/1998. After going through the evidence and record, we see there remained no material on the record to prove the charge of conspiracy and common intention to commit the offence in question by the accused. There is nothing brought on the record to support the prosecution case of illegal smuggling from Pakistan via Punjab for disposal and distribution in large quantity of narcotic drugs. Except naming one Saidulla, a Pakistani, a Shersingh of Punjab and one Prakash of

Bombay, there is no material to link and connect the alleged illegal smuggling or transportation of drugs. We cannot over look the fact that Farooq of Bombay was discharged by an order of the High Court, which was one of the basic link to connect the conspiracy or the offence in question.

11. There were 5 accused in the matter and, as per the prosecution they conspired together to commit the offence in question. At the time of appeal, two of the accused Nos. 4 and 5 were absconding. Accused Mr. Farooq has been already discharged. Therefore, the basic link through those accused, who were not available, definitely affect the prosecution case about the criminal conspiracy and or common intention. Joint charges, as framed against all 5 accused also looses its significance. As per conspiracy and in furtherance of common object meeting was held by the accused, as sought to be contended by the prosecution. No witness has supported the prosecution case of meeting of minds with common intention to commit the offence in question on or about 19/7/1989 at Bombay.

12. We have noted that as per the evidence of P.W.1

and after going through the record, there is nothing to show that the alleged information was reduced into writing, as required and contemplated under section 41 of NDPS Act. There is no authorisation letter on the record. There is nothing the on record to show that this information was even intimated to the higher officer as contemplated under the NDPS Act. The submission of the learned Counsel appearing for the appellant cannot be accepted that the information itself was received by the Deputy/Additional Commissioner of Customs and therefore, there was no question of informing the same to anybody else. The provisions of Section 42 nowhere suggest such intent. There is nothing to show and pointed out that the information, if received by the Additional Deputy Commissioner of Custom, it is not necessary to inform to any other higher officer. In the present case, therefore, non compliance, as referred above is material irregularity, which goes to the root of the matter.

13. There is nothing pointed out that on the given date and time any particular officer was appointed by Gazette publication, as contemplated under section 52A r/w section 52 of the NDPS Act,

14. All the accused were coerced and compelled to give the statement under Section 108 of the Customs Act, after merciless assault at Bombay Central Prison. Therefore, such statement of the accused, including of accused No.3, independently, not sufficient to convict him of the offences charged. Those statements, as noted were retracted later on, by all the accused. It is clear from the record that the accused were arrested on 19/7/1989 at about 5 p.m. and the statements were recorded on 21/7/1989 after two days. During all this period they were in the custody of the Custom Officials. Accused No.3, at the first available opportunity had made an application before the learned Metropolitan Magistrate by way of retraction of the alleged statement extracted from him. It means, the statements, as recorded, were not voluntary. Even the immediate retraction on the first available opportunity also reflects the mental and physical condition of the accused and the reason of making, such self implicating, voluntarily statements. Therefore, such statements needs careful scrutiny. The corroboration required to convict on the basic of such retracted statement must be distinct, clear and cogent.

15. The Apex Court has already settled that such retracted statements can be relied for the conviction. However, subject to the rider that it should be corroborated by other material evidence on the record. As noted, there is no corroboration to link the contents of the voluntary statements made by these respondents to prove the prosecution case.

16. As observed, such voluntary statements in the facts and circumstances of the cases looses its strength in view of the coercion and inducements. There is no supporting strong and independent material evidence to support the said voluntary statements. The retracted statement of accused No.3 is on record by Exh. "R1" and those retractions were made on 21/7/1989 along with other accused. The medical officer’s certificate (Exh.40) also shows 8 injuries on the person of accused No3. All accused No.1 to 3 were assaulted. This fact of injuries found by the Jail Medical Officer was not denied. There is no explanation on record to show how accused Nos. 1 to 3 sustained these injuries. All these accused were apprehended by the Custom Officers on the night of 19th September, 1989 and they were

continuously in the custody of Custom officers till they were shown, as arrested and produced before the Magistrate. Merely, because there was no complaint made by the accused about the assault, at the hands of Custom Officers to the Magistrate before whom they were produced, soon after they were arrested on 21/7/1989, that itself is not sufficient to disbelieve the medical evidence (Exh.40). On retracting the said voluntary statement they stated that there was repeated assault during the custody and were not given food to eat, even glass of water to drink. In this background, we are also of the view, that the statements of the accused recorded under Section 108 of the Customs Act, cannot be the foundation to convict the accused, as it looses the credibility and evendential value, specially when there are no cogent and corroborative evidence to support the prosecution case.

17. The evidence of P.Ws. 1,2,3 and 6, the officials of Custom Department, unable to prove the case against accused No.3 in all aspect. The panchas P.W.9 and 12 also narrated contradictory version and a different version later on. The evidence of this witness no way complete the chain of events to prove the

guilt of accused No.3. There is nothing to prove that the vehicles were owned by accused No.3. Therefore, mere presence of accused No.3 in the vicinity of the car was not sufficient to link the accused No.3 with the crime. The keys, which were alleged to have been found from accused No.3 were not seized with specific remark and numbering or noted through the panchanama on the spot. It is also necessary for the prosecution to prove that accused No.3 was conscious of the alleged contents of the heroin, in the dicky of the car. Merely on the basis of recovery of the keys, specially when the car was not owned by him in the circumstances, it is difficult to accept the prosecution case, that accused No. 3 was conscious and fully aware of the contents of the dicky of the alleged car. It must be proved and linked beyond reasonable doubt that the person was fully aware and has knowledge of the contents of the dicky of the car. In view of the various missing links, it is difficult to convict accused No.3, as rightly observed by the learned Judge, merely on the basis of seizure of these keys.

18. It is very clear that unless the possession is proved, accused cannot be charged for the offence under

the NDPS Act. It is essential to establish in a cases, like this, that the accused and he alone was in exclusive possession the contraband good. Mere presence near the car itself is not sufficient. We have noted that the car was seized from the public place, without even making seizure panchanama on the spot. Therefore, all this evidence of the officers of the raiding party and panchanama shows various flaws in the prosecution case. There is no doubt that such flaws raises doubt about the prosecution case and in such circumstances the accused would be entitled to get the benefit of doubt, 1990 (1) B.C.R.433 (Hemant V. Agwan Vs. State of Maharashtra).

19. There is no cogent evidence to corroborate the fact that accused No.1 had taken, accused Nos. 2 and 3 to Gowalia Tank for driving two cars, parked in Tejpal Lane. Even the evidence of P.W. 1, P.W.3 and P.W 4 have not supported by any independent witnesses except some bald statement by P.W. 1. There is no material to support the case of prosecution connecting accused Nos. 1 to 3, including the panchanama or in previous statements of these officers. There is no such case made out even in the complaint at Exh.26. The witnesses

have referred Maruti van, but evidence on record shows that Maruti Car bearing No.BLB 7445. It is difficult to believe that the custom officers were not aware of the difference between Maruti Van and Maruti Car. Both these witnesses P.W.9 and P.W. 12 not supported the prosecution case. There is no substantial material to connect, that accused No.1 had purchased similar car from P.W. 17 or he was present in the hotel (P.W.9). Therefore, by the learned Judge has rightly discarded the evidence of P.Ws. 11,17 and 19 in reference to accused No.1.

20. As observed by the learned Judge that the prosecution has failed to establish any conspiracy between accused No.1 to 3 for acquiring possession and transportation of drug in question. In view of the reasoning about accused Nos. 2 and 3 in pars 31 to 36, we also feel that the prosecution has failed to connect the accused No.3 with the crime.

21. As there is no satisfactory evidence to connect any of the accused, specially accused No.3, and as the prosecution has failed to establish beyond reasonable doubt that accused No.3 was in possession of the

contraband drugs and, as the charges of conspiracy to commit, aid or abate acquisition, possession or transportation of the drug in question not supported and as the reasoning given by the learned Judge based on the material on the record is possible and plausible, we see there is no reason to interfere with the acquittal Judgment and order passed by the learned Judge.

22. There is no merit in the appeal. The Judgment and order passed by the learned Judge, dated 9/11/1993 is confirmed. The appeal is dismissed. The bail bond stands cancelled.

[S.S. PARKAR, J.]

[ANOOP V. MOHTA, J.]